CF0000058438

(2)

Division Bench (Criminal)

IN THE HIGH COURT OF MADHYAPRADESH AT JABALPUR

CRIMINAL APPELLANT № 1328 of 1995

APPELLANTS
ACCUSED
IN JAIL

1. BHIKAM DAS, son of Pyarodas, Panika, aged 55 years.
2. JEEWAN, son of Bhikam das, aged 18 yrs.
3. SURJA BAI, w/o Bhikhamdas, aged 50 yrs

ALL residents of village Tinkapar, P.S. Dongargarh, district Rajnandgaon.

Vs

RESPONDENT. Stqte of Madhya Pradesh through the District Magistrate, Rajnandgaon

APPEAL UNDER SECTION 374 OF THE CODE OF CRIMINAL PROCEDURE.

13862

Filed on 26/9/95
by Shri Kamal Rai
Advocate

P. to D.R

(32)

HIGH COURT OF JUDICATURE AT BILASPUR, CHHATTISGARH

(DIVISION BENCH)

Criminal Appeal No.1328 of 1995

Bhikam Das and others

- Versus -

State of Madhya Pradesh (now Chhattisgarh)

JUDGMENT FOR CONSIDERATION

Sd/-
L.C. Bhadoo
Judge

HON'BLE MR. JUSTICE DHIRENDRA MISHRA

Sd/-
DHIRENDRA MISHRA
Judge

POST FOR JUDGMENT ON 31st JANUARY, 2006

Sd/-
L.C.BHADOO
Judge

HIGH COURT OF JUDICATURE AT BILASPUR (CHHATTISGARH)

DIVISION BENCH*: -

HON'BLE SHRI L.C. BHADOO AND

HON'BLE SHRI DHIRENDRA MISHRA, JJ.

Criminal Appeal No.1328 of 1995

Bhikam Das and others

- Versus -

State of Madhya Pradesh (now Chhattisgarh)

Present: -

Shri H. P. Agrawal, Advocate: For the appellants.

Shri U.N.S. Deo, Addl. Public Prosecutor: For the State/respondent.

J U D G M E N T

(Delivered on 31st January, 2006)

The following judgment of the Court was delivered by ***L.C. Bhadoo J.*** -

1. Appellants namely Bhikam Das, Jeevan and Smt. Surja Bai have preferred this appeal under Section 374 (2) of the Cr.P.C. questioning the legality of the judgment of conviction and order of sentence dated 24th August, 1995 passed by learned Sessions Judge, Rajnandgaon in S.T. No.52/94 whereby learned Sessions Judge after holding accused/ appellants namely Bhikam Das, Jeevan and Smt. Surja Bai guilty for commission of offence under Sections 302 read with Section 34 and 323 read with Section 34 of the I.P.C., sentenced each of the accused/ appellants to undergo imprisonment for life and to undergo R.I. for 3

months respectively. However, the accused/appellants were acquitted of the charge under Section 307 read with Section 34 of the I.P.C..

2. The case of the prosecution, in brief, is that on 31-1-94 at about 7 a.m. when injured Khorbehra (PW-3) was going to agricultural field to bring rice and straw of rice, he also called his son Narayan to accompany him. When his son was passing through the street, accused Jeevan abused him saying 'whether street belongs to your father' and he felled down Narayan. Thereafter, Khorbehra and Narayan entered their house. However, the accused/appellants also entered the house of Khorbehra, started attacking Narayan and Khorbehra. Indravati (since deceased), mother of Narayan, was cleaning utensils. Seeing this she came to rescue Narayan. Accused Bhikham picked up the crowbar, which was lying in the house of Khorbehra, Jeevan picked up the rammer which was lying in the house of Khorbehra and attacked Indravati with the same. Surja Bai also assaulted with the stone, as a result of which Khorbehra (PW-3), Teras Bai (PW-7) and Narayan (PW-8) sustained the injuries. Indravati received lacerated wound on the left parietal region, bone was also fractured, as a result of which she died. On coming to know about the incident through Netram, PW-1 Kamla Bai, Kotwarin, came to the house of Indravati. On enquiry, Indravati narrated that the accused persons have attacked. There were injuries on the heads of Indravati and Narayan. Blood was oozing out of the injuries of Indravati. The matter was reported by PW-1 Kamla Bai in

the police station Dongergarh under Ex.-P/6. Khorbehra also reported the matter to the police station at about 9.30 a.m. under Ex.-P/20.

3. Initially the offence was registered under Section 307 of the I.P.C., however, later on, when Indravati was being taken to the hospital in a bullock cart, she succumbed to the injuries on the way, therefore, first information report (Ex.-P/23) was registered. The investigating officer left for the scene of occurrence, after giving notice (Ex.-P/4) to the Panchas, prepared Panchanama (Ex.-P/5) of the dead body of the deceased. He took into possession the crowbar and upper under garments of accused Bhikam from the possession of Bhikham under Ex.-P/1. He also took into possession one rammer and shirt from the possession of Jeevan under Ex.-P/2. He took into possession one "saya" from Surja Bai under Ex.-P/3. The blood stained soil, plain soil and one stone were taken into possession from the place of occurrence under Ex.-P/7. The dead body of Indravati was sent for postmortem examination to the Community Health Centre, Dongergarh where Dr. A. K. Tamrakar (PW-4) conducted the postmortem on the dead body of deceased Indravati and prepared the report Ex.-P/8. He opined that the cause of death was head injury and shock. The nature of the death was homicidal. Dr. Tamrakar also examined injuries of Khorbehra on whose body 5 injuries were noticed and prepared injury report Ex.-P/9. He also examined injuries of Narayan and prepared the injury report Ex.-P/10. He also examined injuries of Teras Bai and prepared the injury report Ex.-P/11-A. The site plan (Ex.-P/17) was prepared by

Halka Patwari. The blood stained articles were sent for examination to the Forensic Science Laboratory, Raipur from where reports Ex.-P/25 and Ex.-P/26 were received. After completion of the investigation, charge sheet was filed against the accused in the Court of Judicial Magistrate, 1st Class, Dongergarh, District: Rajnandgaon, who in turn committed the case to the Sessions Judge, Rajnandgaon for trial.

4. The prosecution in order to establish the charge against the accused persons examined 12 witnesses. Statements of the accused persons were recorded under Section 313 of the Cr.P.C. in which they denied the prosecution evidence appearing against them and stated that they are innocent and have been implicated in a false case. Learned Sessions Judge after hearing arguments of Public Prosecutor and counsel for the accused persons, convicted and sentenced each of the accused as mentioned in para-1 of this judgment.

5. We have heard learned counsel for the parties.

6. The homicidal death of Indravati is not in dispute. Apart from that, from the evidence of PW-4 Dr. A.K. Tamrakar who conducted the postmortem on the dead body of deceased Indravati, it is established that Indravati received 2 parallel lacerated wounds on the left side of temporal area in the size of 5 cm. X 3 cm. and there was swelling around the injury. On opening the head, temporal bone was found fractured. Brain was congested and clotted blood was present. He has stated that the cause of death was head injury and same was homicidal in nature. His report is Ex.-P/8. This medical evidence further

corroborated from the evidence of PW-1 Kamla bai before whom Indravati made oral dying declaration, PW-3 Khorbehra, PW-7 Teras Bai and PW-8 Narayan, the injured witnesses who received injuries in the same incident.

7. Now, coming to the involvement of the accused/appellants in inflicting the injuries on the persons of Indravati, PW-3 Khorbehra, PW-7 Teras Bai and PW-8 Narayan. In this connection, PW-3 Khorbehra has stated that on the fateful day in the morning he was going to the agricultural field to bring rice and straw of rice. He also asked his son Narayan to accompany him. When Narayan was passing through the street, accused Jeevan abused him in the name of father, and thereafter he started quarreling. Even the accused persons entered the house of Khorbehra where they assaulted Khorbehra and Narayan. When Indravati came to intervene, accused Bhikam picked up the crowbar (Sabbal) and accused Jeevan picked up the rammer which were lying in the house of Khorbehra and attacked with the same on the head of the deceased. Accused Surja bai also assaulted with the stone, as a result of which Indravati received lacerated wound over left temporal region and even parietal bone was fractured. The evidence of Khorbehra (PW-3) corroborated by the evidence of PW-7 Teras Bai, daughter of Khorbehra, who was present in the house. She also received the injuries. The injury report of Khorbehra is Ex.-P/9 and according to that report 5 abrasions were received by Khorbehra. Narayan received one lacerated wound over left parietal region and bruise over left

lumber region and left hand. Teras Bai also received one abrasion and there was swelling on the wrist. Report is Ex.-P/10. All these injuries have been proved by PW-4 Dr. Tamrakar who examined the injuries of Khorbehra, Narayan and Teras Bai. In the same incident these 3 witnesses received injuries and all of them have stated that accused Bhikam assaulted with crowbar (Sabbal), Jeevan assaulted with rammer and Surja Bai assaulted with stone. Their evidence also corroborated by the evidence of PW-1 Kamla Bai, Kotwarin, who has stated that after coming to know from Netram, she went to the house of Indravati where she saw that Indravati was lying on a cot. On enquiry, she disclosed that the accused persons have inflicted injuries. Narayan was also lying on the cot in injured condition. Khorbehra after receiving the injuries, left for the house of Manglu. Kamla Bai lodged the report Ex.-P/6 in the police station.

8. Learned counsel for the accused/appellants argued that the evidence of these witnesses is omnibus and there is no evidence that which injury was inflicted by which accused and to which person.

9. But, we do not find any substance in this argument. It has come in the evidence of these witnesses that the accused persons, after the quarrel with Khorbehra and Narayan, entered the house of Khorbehra. Accused Bhikam picked up the crowbar (Sabbal), Jeevan picked up the rammer and Surja Bai was having stone and they attacked. It is evident from the site plan Ex.-P/17 that the incident took place at point 4(A) in the house of Khorbehra. In the said incident injuries sustained by

deceased Indravati, Khorbehra, Teras Bai and Narayan are proved by PW-4 Dr. Tamrakar who examined the injuries of these persons. In the cross-examination of these witnesses the defence counsel has not been able to bring out any circumstance which makes the evidence of these witnesses untrustworthy or unreliable.

10. Learned counsel for the accused/appellants further argued that no independent witness has been examined by the prosecution. Learned counsel for the accused/appellants placed reliance on a decision of the Hon'ble Apex Court in the matter of **Hem Raj and others V. State of Haryana** reported in **2005 AIR SCW 1885.**

11. It is true that no independent witness has been examined and the injured witnesses are family members but their evidence cannot be disbelieved only on this ground. The Court is required to scrutinize their evidence with care and precaution, as each of the injured witnesses has categorically proved that the accused persons were author of the injuries and their evidence stands corroborated by the medical evidence. Moreover, PW-1 Kamla Bai has also stated that on coming to know, when she went to the house of Khorbehra, she saw that Indravati was lying in injured condition in her house and on enquiry, she made oral dying declaration before her that the accused persons have inflicted the injuries. Therefore, we do not find any illegality or infirmity in the finding of the trial Court regarding involvement of the accused persons in the crime in question. The judgment cited by learned counsel for the accused/appellants is of no help to the

accused/appellants as the same is distinguishable on facts. In the case of **Hem Raj and others** (Supra), the evidence of eyewitnesses was shaky that is why the Hon'ble Apex Court held that 'the corroboration of the testimony of the related witnesses P.Ws. 4 and 5 by a known independent eye-witness could have strengthened the prosecution case, especially when the incident took place in a public place.' It has been observed that:

> "Non-examination of independent witness by itself may not give rise to adverse inference against the prosecution. This Court pointed out in **Takhaji Hiraji V. Thakore Kubersing Chamansing and others** [(2001) 6 SCC 145]:-.....if already overwhelming evidence is available and examination of other witnesses would only be a repetition or duplication of the evidence already adduced, non-examination of such other witnesses may not be material. In such a case, the Court ought to scrutinize the worth of the evidence adduced.

As has been mentioned above, in the present case, all the witnesses are injured witnesses and their evidence have been proved by PW-4 Dr. Tamrakar. Moreover, the incident took place in the house of Khorbehra. The evidence of these witnesses further corroborated by the oral dying declaration made by Indravati before PW-1 Kamla bai, who is an independent witness and who saw the injured persons in their house and that has been proved by PW-1.

12. Learned counsel for the accused/appellants further placed reliance on the judgment of the Hon'ble Apex Court in the matter of **SHIVAPPA BUDDAPPA KOLKAR ALIAS BUDDAPPAGOL VERSUS STATE OF KARNATAKA AND OTHERS** reported in **2005 SCC (Cri) 93** and argued that offence against accused Bhikam and Jeevan does not travel beyond Section 325 of the I.P.C. and offence against accused Smt. Surja Bai does not travel beyond Section 323 of the I.P.C.. There is no evidence that who was the author of head injury of Indravati. There is no evidence that the accused persons assaulted the deceased with the intention to cause her death. The quarrel ensued on the spur of moment, without any pre-plan.

13. On the other hand, learned Additional Public Prosecutor supported the prosecution case.

14. In order to appreciate the argument advanced by learned counsel for the accused/appellants, and also in order to establish the case of culpable homicide amounting to murder, it is necessary to establish all the ingredients of Section 300 of the I.P.C. Clause 3 of Section 300 of the I.P.C. envisages that there must be an intention of causing such bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death. If we look into the evidence adduced by the prosecution, it is evident from the evidence of the prosecution witnesses that PW-3 Khorbehra was going to the agricultural field, he also called PW-8 Narayan to accompany him, when Narayan was passing through the street, accused

Jeevan asked Narayan as to why he is passing through the street, whether the street is of his father and in that process quarrel ensued. Narayan went to his house. Accused Bhikam, Jeevan and Smt. Surja Bai entered the house of Khorbehra. Accused Bhikam picked up crowbar, which was lying in the house of the deceased, accused Jeevan picked up rammer which was also lying in the house of the deceased and they assaulted the injured persons all of a sudden. Therefore, from the above evidence, it is established that the quarrel ensued all of a sudden, when Narayan was passing through the street, as there was already a dispute regarding the use of street between the parties and in that process, without any pre-plan or pre-meditation, accused Bhikam picked up crowbar, accused Jeevan picked up the rammer and accused Smt. Surja Bai picked up a stone and assaulted in a sudden quarrel, in a heat of passion. Therefore, intention to cause the death of Indravati by the accused persons has not been established by the prosecution evidence. The case is squarely covered under Exception IV of Section 300 of the I.P.C. because the manner in which accused Bhikam assaulted with crowbar, accused Jeevan assaulted with rammer, they had knowledge that by attacking with crowbar and rammer on the head of the deceased, they are likely to cause the death of the deceased. Therefore, offence under Section 304 II read with Section 34 of the I.P.C. is made out against accused/appellants Bhikam and Jeevan.

15. Now coming to the question as to what offence has been committed by accused Surja Bai, from the evidence it is established that 2 parallel

lacerated wounds were found on the left parietal area of the deceased and the doctor has stated that these injuries can be caused by any of the weapon. So far as accused Surja Bai is concerned, the allegation against her is that she attacked with a stone. As has been mentioned above, injuries found on the parietal region of the deceased was, in all probability, caused either by rammer or crowbar used by accused Jeevan and Bhikam whereas, only stone was used by Surja Bai. Therefore, 2 fatal injuries found on the parietal region of the deceased cannot be attributed to accused Surja Bai. She has been convicted with the aid of Section 34 of the I.P.C.. The Hon'ble Apex Court in the matter of **Girija Shankar Versus State of U.P.** reported in **2004 AIR SCW 810** held that:-

> "The distinctive feature of the Section is the element of participation in action. The liability of one person for an offence committed by another in the course of criminal act perpetrated by several persons arises under S.34 if such criminal act is done in furtherance of common intention of the persons who join in committing the crime. Direct proof of common intention is seldom available and, therefore, such intention can only be inferred from the circumstances appearing from the proved facts of the case and the proved circumstances. In order to bring home the charge of common intention, the prosecution has to establish by evidence, whether direct or circumstantial, that there was plan or meeting of mind of all the accused persons to commit the offence for which they are charged with the aid of S.34, be it pre-arranged or on the spur of moment; but it must necessarily be

> before the commission of the crime. The true concept of Section 34 is that if two or more persons intentionally do an act jointly, the position in law is just the same as if each of them has done it individually by himself. The existence of a common intention amongst the participants in a crime is the essential element for application of this Section. It is not necessary that the acts of the several persons charged with commission of an offence jointly must be the same or identically similar. The acts may be different in character, but must have been actuated by one and the same common intention in order to attract the provision.

Applying the above principle, if we look into the evidence adduced by the prosecution, it is difficult to arrive at a conclusion that all the three accused persons were having common intention or even common knowledge to cause the death of Indravati. The quarrel ensued between the parties on a petty matter on use of street by Narayan and in that process accused Bhikam picked up crowbar, accused Jeevan picked up rammer from the house of injured persons, they were quarrelling with Narayan and Khorbehra. Indravati, all of a sudden, came and started intervening. Accused Bhikam and Jeevan attacked her also. Therefore, it cannot be held that Surja Bai was sharing intention with accused Bhikam and Jeevan to inflict injuries by crowbar and rammer to cause her death. As far as Surja Bai is concerned, the prosecution has not been able to establish the ingredient of Section 34 of the I.P.C. against her, therefore, provisions of Section 34 of the I.P.C. are not attracted as against Surja Bai.

In view of the above, it can safely be held that accused Surja Bai has been wrongly convicted with the aid of Section 34 of the I.P.C. for committing the death of Indravati.

16. As far as conviction under Section 323 read with Section 34 of the I.P.C. is concerned, as per the injuries received by all the injured persons and the manner in which they used weapon, the trial Court has rightly convicted each of the accused persons under Section 323 read with Section 34 of the I.P.C.. To that extent, we do not find any illegality and infirmity in the judgment of the trial Court.

17. In the result, finding of the trial Court convicting accused Bhikam and Jeevan under Section 302 read with Section 34 of the I.P.C. cannot be sustained, therefore, their conviction and sentence awarded under Section 302 read with Section 34 of the I.P.C. are set aside, instead thereof, they are convicted under Section 304-II read with Section 34 of the I.P.C. and each of the accused is sentenced to undergo R.I. for 10 years under that section. Accused Surja Bai is acquitted of the charge under Section 302 read with Section 34 of the I.P.C.. The conviction and sentence awarded against her under that section are set aside. However, the conviction and sentence under Section 323 read with Section 34 of the I.P.C. against all the three accused persons namely Bhikam Das, Jeevan and Smt. Surja Bai are maintained. Smt. Surja Bai has already served out the sentence as she was under detention for about more than 2 years. Accused Bhikam and Jeevan are also in detention since 1994, and they have also served out the

sentence, therefore, they be set at liberty forthwith, if not required in any other case. Accused Surja Bai is already on bail, therefore, her bail bonds are cancelled.

Sd/-
L.C.BHADOO
Judge

Sd/-
DHIRENDRA MISHRA
Judge

Barve